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9 **UNITED STATES DISTRICT COURT**  
10 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

11 In re

12 YBA NINETEEN, LLC

13 Debtor/Appellant

14 v.

15 INDYMAC VENTURE, LLC

16 Appellee.

Case No. 13-cv-02426-DMS-WMC

BK Appeal No. 3

***EX PARTE MOTION FOR STAY***  
***PENDING APPEAL***

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Debtor and Appellant YBA Nineteen, LLC (“Debtor”), hereby moves this Court for an order staying the Bankruptcy Court’s Order Converting Case To One Under Chapter 7 of October 4, 2013, as the Bankruptcy Court failed to follow the Bankruptcy Code, specifically 11 U.S.C. Section 1112(b) requiring a noticed motion and an opportunity to be heard on a motion to convert and abused its discretion in converting the Debtor’s case under the Scheduling Order and 11 U.S.C. Section 105(a). Debtor requested a stay pending appeal at the hearing of this matter and the Bankruptcy Court refused to stay the effect of the order in any way (Federal Rule of Bankruptcy Procedure 8005.)

# I.

## STATEMENT OF CASE

### *A. Summary of Procedural Nature of Case.*

As the District Court is aware, this is the third appeal of a decision by the Bankruptcy Court in this matter. In this instance, the Debtor is appealing the Bankruptcy Court’s order converting the Debtor’s case from chapter 11 to chapter 7 under the Bankruptcy Court’s own motion on a sua sponte basis. The Debtor has listed Indymac Venture, LLC as the appellee as Indymac Venture, LLC was present at the hearing on the status conference. Indymac Venture, LLC made the original suggestion for conversion and has requested notice in the pending appeal.

The first appeal, *YBA Nineteen v. Indymac Venture, LLC*, Case Number 13-cv-01326-WQH-RBB (the “First Appeal”) (See Notice of Lodgment (“NOL”) Exhibit A, a true and correct copy of the docket for the First Appeal) dealt with the Bankruptcy Court’s decision to grant relief from stay under 11 U.S.C. Section 362(d)(1) for cause as against the Debtor’s real property located at 5955 La Jolla Corona Drive, La Jolla, California 92037 (the “Subject Property”), including a ruling that the matter had been filed in bad faith, and under (d)(2) for a lack of equity as the Debtor had initially provided a qualified value of just \$1,500,000, whereas the secured claim of Indymac Venture, LLC (“Indymac”) was approximately \$3,900,000.

1 The bad faith finding was made based on legal and factual arguments that were first  
2 raised by Indymac in its reply brief and on the Court's discussion of various factors,  
3 including the lack of equity in the real property. Debtor was not allowed to respond  
4 to the allegations of bad faith in any way. The (d)(2) relief was based solely on the  
5 lack of equity. The Bankruptcy Court found that a lack of equity existed despite the  
6 fact that the Debtor had provided significant evidence that the real property was likely  
7 worth anywhere between \$5,800,000 and \$8,000,000 when the real property was  
8 ready for sale. The Debtor filed a motion for reconsideration based on newly  
9 discovered evidence in the form of a \$5,100,000 valuation that provided an "as is"  
10 value for the real property. The Bankruptcy Court refused to consider this new  
11 evidence and upheld the relief from stay order. (See NOL, Exhibit A, First Appeal  
12 Docket No. 5, the Bankruptcy Appellant's Brief).

13 The District Court reversed the Bankruptcy Court on appeal, citing In re Can  
14 Alta Properties, Ltd. (1988 9<sup>th</sup> Cir. BAP 87 BR 89), which determined that if a debtor  
15 was not formed on the eve of bankruptcy, had relief from stay granted less than six  
16 months after its petition and had significant equity in the real property, that relief  
17 from stay for a bad faith filing was not appropriate. The District Court remanded the  
18 matter to the Bankruptcy Court to determine if the \$5,100,000 value could be credited  
19 and for the Bankruptcy Court to re-evaluate its granting of relief from stay based on  
20 the existence of equity in accordance with Can Alta. (See NOL, Exhibit A, First  
21 Appeal Docket No. 15, the District Court's Order).

22 On remand, the Bankruptcy Court held three days of evidentiary hearings  
23 limited solely to determining the value of the Subject Property. Despite Debtor's  
24 efforts to, for the first time, provide evidence that would rebut the issue of bad faith  
25 raised by Indymac in its original reply brief, the Bankruptcy Court refused to allow  
26 any such testimony, indicating that the District Court had remanded the matter only  
27 to consider the value of the Subject Property. In direct contradiction of the District  
28 Court's remand order and the Bankruptcy Court's admission that the remand was

1 limited to the determination of the Subject Property, the Bankruptcy Court eventually  
 2 went on to determine that equity was not a determining factor in granting relief from  
 3 stay for bad faith under 362(d)(1), ignoring the law of the case established by the  
 4 District Court. After not allowing the Debtor to present evidence of good faith, the  
 5 Bankruptcy went through the trouble of finding new evidence of bad faith by its own  
 6 research and finding case law that the Bankruptcy Court found more persuasive than  
 7 the case law established by the District Court. Based on these new determinations,  
 8 the Bankruptcy Court once again granted relief from stay on September 18, 2013 for  
 9 bad faith filing. Apparently hoping to prevent the Debtor from having a new appeal  
 10 heard prior to Indymac's immediately scheduled foreclosure, the Bankruptcy Court  
 11 allowed Indymac to lodge an order without providing the required seven (7) day  
 12 notice period under the local rules and provided the Debtor with only a twenty-four  
 13 hour window to obtain a stay pending appeal from the District Court. The order  
 14 granting relief from stay for a second time was entered the order the same day. The  
 15 Debtor filed its second appeal with the District Court the same day, YBA Nineteen,  
 16 LLC v. Indymac Venture, LLC, Case Number 13-cv-02239-WQH-RBB (the "Second  
 17 Appeal") (See NOL Exhibit B, a true and correct copy of the docket for the Second  
 18 Appeal). The Debtor filed an ex parte application for stay of the foreclosure pending  
 19 appeal on September 19, 2013 (See NOL Exhibit B, Docket No. 3). The District  
 20 Court granted stay pending appeal and scheduled a hearing for the appeal on October  
 21 17, 2013 (See NOL Exhibit B, Docket No. 6).

22 *B. Bankruptcy Procedure Leading Up To The October 3, 2013 Status Conference.*

23 The Debtor filed for bankruptcy protection on January 31, 2013. On March 6,  
 24 2013, the Bankruptcy Court issued its standard Order Re: Chapter 11 Petition 1)  
 25 Setting Status Conference; 2) Setting Compliance Deadlines; 3) Setting Disclosure  
 26 Statement and Plan Filing Deadlines, and 4) Setting Sanctions, If Appropriate,  
 27 Including Dismissal, Conversion or Appointment of a Chapter 11 Trustee or  
 28 Examiner Because of NonCompliance With Above-Reference (sic) Requirements"



(the "Scheduling Order") (See NOL, Exhibit C, the Scheduling Order). The Scheduling Order set a status conference on April 11, 2013 at 2:30 p.m.

The Scheduling Order provides "prior to the above-referenced status conference, the Debtor shall have complied with all applicable ORR, federal and local bankruptcy rules governing Chapter 11 cases, including, but not limited to:

- a. Closure of pre-petition bank accounts and proof of opening new debtor-in-possession bank accounts [11 U.S.C. Section 345; ORR B.2] and inclusion of U.S. Trustee as a party entitled to notice on all insurance policies [ORR C.1];
- b. Submission of all applications for employment of professionals [11 U.S.C. Section 327(a); LBR 2014-1];
- c. Submission of all application(s) for payment of insider compensation or other remuneration...;
- d. Submission of all operating reports due under ORR C.2;
- e. filing of 90 day cash flow budget as required by ORR C.2;
- f. Submission of Motion or notice of agreement to use cash collateral, if applicable."

At the time of the Status Conference on April 11, 2013, the Debtor had complied with all of these requirements. The Scheduling Order goes on to require that the Debtor file a status report one week in advance of any status conference. At the first status conference, the Bankruptcy Court did not require any such status report, instead inquiring of the Debtor and the Office of the United States Trustee (the "U.S. Trustee") as to whether the above requirements had been met. The U.S. Trustee, represented by Kristen Mihelic, indicated that no further documents were needed. The U.S. Trustee did indicate that the Debtor should consider amending Schedules B and D in its bankruptcy filing. The Bankruptcy Court did not indicate that any violation of the Scheduling Order had taken place and continued the hearing to July 18, 2013, instructing the Debtor to file a Disclosure Statement and Plan, set a claims bar date and amend Schedules B and D (See NOL Exhibit D, a true and correct copy of the Minute Order for the April 11, 2013 Status Conference). The Debtor complied with the requirement to set a claims bar date. The Debtor complied with the requirement for the Debtor to amend its schedules. The Debtor did not comply with the requirement to file a Disclosure Statement and Plan. However, there



1 was a significant justification for this. Between April 11, 2013 and July 18, 2013,  
2 Indymac had filed a relief from stay, the Debtor had opposed it, a preliminary hearing  
3 was held, the relief from stay was granted and Debtor eventually had the relief from  
4 stay overturned on appeal. The District Court's order was entered on June 28, 2013  
5 and the Bankruptcy Court set a status conference for July 11, 2013 to consider how  
6 to proceed with the relief from stay hearing (See NOL Exhibit E, a true and correct  
7 copy of the Bankruptcy Court's Order setting the relief from stay status conference).  
8 These significant changes in circumstances prevented the Debtor from being able to  
9 prepare a disclosure statement and plan, as the issue of ownership of the Subject  
10 Property is the cornerstone of any plan of reorganization, and this issue was in flux  
11 until June 28, 2013.

12 At the July 18, 2013 hearing, the Bankruptcy Court once again did not require  
13 a written status report. Instead, the Bankruptcy Court inquired of the U.S. Trustee  
14 whether any documents were outstanding and inquired of the Debtor why a plan and  
15 disclosure statement had not been provided. Satisfied with the Debtor's explanation,  
16 the Bankruptcy Court gave the Debtor until July 22, 2013 to file its disclosure  
17 statement and plan. No other requirements were requested of the Debtor other than  
18 to file expert's reports by July 25, 2013 in relation to the ongoing relief from stay  
19 dispute. The Status Conference was continued to September 5, 2013 at 11:00 a.m.  
20 (See NOL Exhibit F, a true and correct copy of the July 18, 2013 minute order) The  
21 Debtor did comply with the deadline to file its disclosure statement by filing the same  
22 along with a plan of reorganization on July 22, 2013 (See NOL Exhibit G, a true and  
23 correct copy of the Bankruptcy Court's docket in the underlying bankruptcy, Docket  
24 No.'s 76 and 77).

25 The September 5, 2013 hearing was continued by stipulation to October 3,  
26 2013 (See NOL Exhibit G, Docket No. 93). Prior to the October 3, 2013, Indymac  
27 filed an opposition to the Disclosure Statement along with a suggestion to the  
28 Bankruptcy Court that the entire case should be converted due to the Debtor's

1 inability to reorganize without the Subject Property (See NOL Exhibit G, Docket No.  
2 128). The stay pending appeal entered by the District Court ensured that the Subject  
3 Property would remain under Debtor's control at least until the October 3, 2013  
4 hearing (See NOL Exhibit H, a true and correct copy of the District Court's Order  
5 Staying the foreclosure). Also prior to the October 3, 2013, the Bankruptcy Court  
6 issued a tentative ruling that allowed the Debtor time to revise its disclosure statement  
7 and plan in light of the fact that the Bankruptcy Court had granted relief from stay  
8 (See NOL Exhibit I, a true and correct copy of the tentative ruling). The tentative  
9 ruling made absolutely no mention of the possibility of a conversion for any reason.  
10 As such, the Debtor had no reason to believe that the issue of conversion would be  
11 entertained by the Bankruptcy Court. Finally, prior to the October 3, 2013 hearing,  
12 the Debtor submitted a status report informing the Bankruptcy Court that repairs had  
13 been commenced on the Subject Property in order to deal with the oncoming rainy  
14 season and ensure that the Subject Property was being maintained for the benefit of  
15 the estate (See NOL, Exhibit J, a true and correct copy of the status report). This was  
16 partially in response to Indymac's claims that the Subject Property was under  
17 imminent danger due to the upcoming rainy season.

18 At the October 3, 2013 status conference, the Bankruptcy Court continued  
19 misleading the Debtor by going through the various scheduling issues related to the  
20 submission of a first amended disclosure statement and plan. Before the Court  
21 finalized the time and date for a continued hearing, Indymac requested an opportunity  
22 to be heard. During Indymac's counsel's impassioned speech, Indymac raised **for the**  
23 **first time** the issues of late filed operating reports, the issue of missing operating  
24 reports, the issue of the late filed status report and repeated the issue of the Debtor's  
25 inability to reorganize. The Bankruptcy Court then made a show of reviewing the  
26 docket and pulling various documents for review. The Bankruptcy Court then  
27 allowed the Debtor, with no prior warning, to oppose the sua sponte conversion of the  
28 case. It was clear that no amount of oral argument would sway the Bankruptcy

1 Court's mind. After rejecting the Debtor's arguments, the Bankruptcy Court set forth  
2 its all too well organized reasons for converting the case. It is clear that the  
3 Bankruptcy Court had anticipated conversion prior to the hearing but had not deemed  
4 it necessary to forewarn the Debtor of this possibility. The Debtor has requested an  
5 expedited transcript of hearing, however, the Debtor has been informed that the  
6 transcript will not be available until late this week, possibly after the hearings on the  
7 other pending appeal and after the motion to dismiss the adversarial action pending  
8 before the Bankruptcy Court (See Declaration of Gustavo E. Bravo).

9 After the hearing was concluded, the Bankruptcy Court prepared its own order.  
10 The Order Converting the Case To One Under Chapter 7 (the "Conversion Order")  
11 is attached to the Debtor's NOL as Exhibit K. The Conversion Order set forth the  
12 Bankruptcy Court's findings as "cause" to convert the case. First and foremost, the  
13 Bankruptcy Court indicates that it found that Debtor had violated Paragraph 3 of the  
14 Scheduling Order. The reason for this violation is Debtor's filing of its status report  
15 on October 3, 2013, the same date as the continued status conference. No reason was  
16 given as to why this constituted "cause" for conversion or how this delay adversely  
17 affected anybody. Indeed, Indymac sought to use the contents of the status report,  
18 namely that the Debtor had commenced repairs, to its own advantage somehow  
19 finding the gall to argue that repairs to the Subject Property, which all parties  
20 involved have agreed would increase the value by at least \$500,000, actually  
21 increased Indymac's risk.

22 The Bankruptcy Court then determines that the Debtor has violated Paragraph  
23 2.d. of the Scheduling requiring Debtor to be current on Monthly Operating Reports  
24 ("MORs"). The Bankruptcy Court notes that the Debtor was late for its May MOR  
25 when it was filed on July 16, 2013. This issue was not raised at the July 18, 2013  
26 status conference. No opportunity was given to the Debtor to explain why the report  
27 was late and no explanation was given as to how the filing of a late operating report  
28 could be considered "cause" for conversion as the United State Trustee ("U.S.

Trustee”) had not previously claimed that the late filed operating report had been a concern to the U.S. Trustee or any of the Debtor’s creditors. This would be particularly true because the Subject Property is not leased. Next, the Bankruptcy Court indicates that the Debtor had failed to file MORs for July or August, 2013. The fact is, the Debtor had filed its July MOR on September 11, 2013 at docket number 114.<sup>1</sup> As to the August MOR, the Debtor acknowledged at the hearing that the reports was late in being filed, however, the Debtor believes there was significant justification for the lateness of the August MOR (and indeed for previous late filed reports). The August MOR was due on September 20, 2013. As provided above, the Bankruptcy Court granted relief from stay to Indymac on September 18, 2013. The Debtor was given to September 19, 2013 to obtain a stay pending appeal, or the Subject Property would be foreclosed upon that same day. The Debtor obtained an order staying the foreclosure from this Court and was then given until September 27, 2013 to file its appellate brief.<sup>2</sup> The status conference took place just four business days after the Debtor submitted its brief. Debtor requested an opportunity to have an evidentiary hearing on the “causes” raised by Indymac and latched onto by the Bankruptcy Court and offered to have the August MOR on file the same day. The Bankruptcy Court refused to give any such opportunity, preferring to grant to itself the extraordinary relief of converting the case to chapter 7 on its own motion and on a sua sponte basis.

The Bankruptcy Court then stated that it had disapproved the Debtor’s Disclosure Statement. The main reason for the Bankruptcy Court’s rejection of the Disclosure Statement is because the Bankruptcy Court has granted relief from stay

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<sup>1</sup> The Debtor has previously argued that the Bankruptcy Court has developed a clear bias against the Debtor, but to have a Bankruptcy Court ignore a filing in its own docket is, to say the least, clear cause for concern.

<sup>2</sup>The Debtor’s appellate brief consisted of 38 pages of points and authorities along with two separate notices of lodgment which set forth the record on appeal as best as possible on a shortened briefing schedule.

1 on the Subject Property and the Bankruptcy Court anticipates that the Subject  
2 Property should be foreclosed on shortly. The Bankruptcy Court comfortably ignores  
3 the fact that the District Court has previously granted an appeal reversing the  
4 Bankruptcy Court's previous relief from stay order or that the Bankruptcy Court's  
5 second order on relief from stay is again before the District Court for another appeal.  
6 Apparently, the District Court's previous reversal and the second, potential reversal  
7 of a relief from stay order should not be given any weight. The Bankruptcy Court  
8 then noted that the Debtor's most recent operating report showed a post-petition loss  
9 totaling \$83,267.01 as of June 30, 2013 with no business income. The Bankruptcy  
10 Court also comfortably ignores the fact that the Debtor had sought to put into  
11 evidence a cashier's check for \$450,000 that was submitted as evidence of the  
12 availability of funds to cover any and all expenses and that the Subject Property has  
13 increased in value over time so as to potentially cover any of the alleged losses (See  
14 NOL Exhibit L, a true and correct copy of the Debtor's Trial Exhibits<sup>3</sup>). As provided  
15 above, the Bankruptcy Court has intentionally prevented the Debtor from having any  
16 such evidence admitted into the record. The Bankruptcy Court notes that no  
17 payments have been made to Indymac on a post-petition basis. The Bankruptcy Court  
18 once again comfortably ignores the fact that the Debtor has offered adequate  
19 protection payments to Indymac consistently throughout the relief from stay process  
20 starting with its filing on April 25, 2013 (See NOL Exhibit G, Docket Number 25),  
21 significantly increased its offer on May 29, 2013 (See NOL Exhibit G, Docket  
22 Number 40), repeated this offer on July 5, 2013 (See NOL Exhibit G, Docket Number  
23 64) and attempted to present evidence of adequate protection offers at every  
24 evidentiary hearing held. The Bankruptcy Court also ignores that Indymac has  
25 refused to accept any such offers and that the Bankruptcy Court has refused to order  
26 any such payments to be made and accepted. The Bankruptcy Court next notes in

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27  
28 <sup>3</sup> The Debtor has previously submitted a copy of the cashier's check to the District Court as  
part of the record from the Second Appeal, NOL Exhibit B, Docket No. 11)



1 its Conversion Order that the Debtor had not commenced repairs of the alleged water  
2 intrusion despite the approaching rainy season. The Bankruptcy Court comfortably  
3 continues to ignore the fact that the Debtor had offered to present testimony regarding  
4 the Debtor's efforts to identify a solution to the alleged water intrusion issue, had  
5 identified the best way to do so and had commenced repairs as of the status  
6 conference including the erection of scaffolding (See NOL, Exhibit J). The Debtor  
7 informed the Court that repairs were anticipated to be completed within ten days. As  
8 provided below, the Debtor anticipates that repairs will, in fact, be finalized no later  
9 than October 16, 2013. Despite the overwhelming evidence to the contrary<sup>4</sup>, the  
10 Bankruptcy Court found that there is a substantial and continuing loss to or  
11 diminution of the estate and that the absence of a reasonable likelihood of  
12 rehabilitation existed based on the record available to the Bankruptcy Court. It is  
13 necessary to point out that the Bankruptcy Court relied upon its Scheduling Order as  
14 allegedly providing notice to the Debtor of the potential conversion, however, the  
15 Scheduling Order fails to provide that it is putting the Debtor on notice of potential  
16 conversion under the grounds of continuing loss or the absence of a reasonable  
17 likelihood of reorganization.

18 The Bankruptcy Court has made the determination of continuing loss and  
19 inability to reorganization despite the fact that the Bankruptcy has consistently  
20 manipulated the record against the Debtor, refusing to allow the Debtor to present any  
21 evidence of good faith, any evidence of the Debtor's ability to reorganize and any  
22 evidence as to the source of funds to reorganize. As the District Court will recall, the  
23 Debtor was prevented from offering any evidence of good faith in the original relief  
24 from stay motion because the issues of bad faith and inability to reorganize were first  
25 raised in Indymac's reply (See NOL Exhibit A, Docket No. 5). When the Debtor  
26 requested an evidentiary hearing to present such evidence, the Bankruptcy Court  
27

28 <sup>4</sup> The fact that the Bankruptcy Court has refused to allow such evidence into the record does not mean that such evidence does not exist.

1 refused the request and claimed, unbelievably, that the Debtor should have been  
 2 aware that those issues would be raised on reply and should have anticipated these  
 3 unknown arguments in its opposition<sup>5</sup>. When the Bankruptcy Court had the relief  
 4 from stay motion returned to it by the District Court after its initial ruling was  
 5 overturned, the Bankruptcy Court at first indicated that good faith, ability to  
 6 reorganize and evidence of availability of funds would be relevant and that it would  
 7 allow the Debtor's representative, Kamran Banayan, to testify on those issues once  
 8 the issue of valuation was fully dealt with. The Bankruptcy Court then refused to  
 9 allow such testimony because, in the Bankruptcy Court's view, the only issue before  
 10 the Bankruptcy Court on remand was the value of the Subject Property. The  
 11 Bankruptcy Court then ignored the valuation issue and found that bad faith still  
 12 existed and valuation was not a consideration in that finding. Amazingly, the  
 13 Bankruptcy Court used the Section 341 testimony of Mr. Banayan against the Debtor  
 14 despite never allowing the Debtor to call Mr. Banayan to the stand (See NOL Exhibit  
 15 B, Docket No. 11). Finally, at the status conference, Indymac was allowed to argue  
 16 the same issues of bad faith, inability to reorganize and the lack of funds without  
 17 notice and without having requested a hearing. Not surprisingly, the Debtor's request  
 18 for an evidentiary hearing on this matter was summarily denied.

19 *C. Current Status of Subject Property and Repairs.*

20 As the Debtor indicated in its status report, the Debtor commenced repairs prior  
 21 to the Status Conference. It is anticipated that all repairs will be substantially  
 22 complete no later than October 17, 2013. The Debtor believes, based on its  
 23 communications with specialist subcontractors, Debtor's own extensive and time  
 24 consuming research and having Aviara complete the work at Debtor's expense, that  
 25 the repairs will have resolved the issues related to the alleged water intrusion.  
 26 Perhaps just as important as preventing further water intrusion, the completion of the  
 27

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28 <sup>5</sup> If this is to be the case for all bankruptcies, debtors will need more than attorneys, they will need clairvoyant psychics.



repairs will have increased the value of the Subject Property by no less than \$500,000<sup>6</sup>. Whether the value prior to the repairs was \$4,300,000 or \$5,300,000 under the competing valuations of Indymac and the Debtor, the value of the Subject Property will have increased to between \$4,800,000 and \$5,800,000. The increase in value means that the Debtor has significant equity in the Subject Property, that there has not been any ongoing loss and that adequate protection payments are immediately available through cash payments to the Debtor. In addition, the Debtor has presented evidence to the Bankruptcy Court that tends to show that the Subject Property has increased in value during the bankruptcy due to a surging real estate market<sup>7</sup>.

## II.

### LEGAL BASIS FOR STAY PENDING APPEAL

A. *The Bankruptcy Court's Ruling is a "Final Order" and is Therefore Immediately Appealable.*

"The district courts of the United States shall have jurisdiction to hear appeals... from final judgments, orders, and decrees..." 28 U.S.C. § 158(a)(1). "The Court has jurisdiction over the appeal of the bankruptcy court's ruling on the automatic stay pursuant to 28 U.S.C. § 158(a)(1)." "An order converting a case under another chapter to one under chapter 7 determines finally the discrete issue to which it is addressed, i.e., whether or not it will be converted." (*In re Rosson*, (9<sup>th</sup> Cir. 2008) 545 F.3d 764, 769). Moreover, because a conversion to chapter 7 takes control of the estate out of the hands of the debtor, it seriously affects substantive rights and may lead to irreparable harm to the debtor if immediate review is denied. (See *Mason v.*

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<sup>6</sup> The Debtor and Indymac stipulated on the record that the ongoing water intrusion problems with the Subject Property's windows resulted in a negative stigma on the Subject Property. The negative stigma was given a \$500,000 value by both Debtor and Indymac's valuation experts. In fact, Indymac's expert had provided a \$4,800,000 valuation which did not discuss repairs, only discussing completion of the property to final.

<sup>7</sup>Not surprisingly, the Bankruptcy Court refused to admit any such evidence into the record. The Bankruptcy Court's bias knows no bounds. See NOL Exhibit B, Docket No. 11.

1 Young (In re Young), (10<sup>th</sup> Cir. 2001) 237 F.3d 1168, 1173). It is established “that a  
2 bankruptcy court order converting a case from one under another chapter of the  
3 Bankruptcy Code to one under chapter 7 is a final and appealable order.” (In re  
4 Rosson at 770). Therefore, because the Bankruptcy Court’s Conversion Order is  
5 final, the District Court has jurisdiction to hear this appeal under 28 U.S.C. Section  
6 158(a)(1).

7 *B. Motion For Stay Pending Appeal.*

8 Debtor hereby moves the Court for an order staying the lender’s sale of the  
9 Real Property pending the outcome of the appeal of the Bankruptcy Court’s order  
10 denying reconsideration. (Federal Rule of Bankruptcy Procedure 8005.) Rule 8005  
11 reads, in pertinent part:

12 A motion for a stay of the judgment, order, or decree of a  
13 bankruptcy judge, for... relief pending appeal must ordinarily be  
14 presented to the bankruptcy judge in the first instance.  
15 Notwithstanding Rule 7062 but subject to the power of the district  
16 court... reserved hereinafter, the bankruptcy judge may suspend  
17 or order the continuation of other proceedings in the case under  
18 the Code or make any other appropriate order during the  
19 pendency of an appeal on such terms as will protect the rights of  
20 all parties in interest. A motion for such relief, or for modification  
21 or termination of relief granted by a bankruptcy judge, may be  
22 made to the district court..., but the motion shall show why the  
23 relief, modification, or termination was not obtained from the  
24 bankruptcy judge. The district court... may condition the relief it  
25 grants under this rule on the filing of a bond or other appropriate  
26 security with the bankruptcy court. When an appeal is taken by a  
27 trustee, a bond or other appropriate security may be required...  
28 (*Id.*, emphasis added.)

21 This Court has the authority to hear this motion and to grant an order staying  
22 Lender’s sale of the Real Property pending the appeal because the Bankruptcy Court  
23 has already denied the Debtor’s oral motion to stay the order. (*Ibid.*)

24 *C. Legal Standard for Issuing a Stay Under Federal Rule of Bankruptcy*  
25 *Procedure § 8005.*

26 “When deciding whether to issue a discretionary stay pending a bankruptcy  
27 appeal, courts use the following four factors: (1) Lender’s likelihood of success on the  
28 merits of the appeal; (2) significant and/or irreparable harm that will come to Lender

absent a stay; (3) harm to the adverse party if a stay is granted; and (4) where the public interest lies.” *In re North Plaza, LLC, supra*, 395 B.R. at 119-120.

After reciting the four factors set forth above, the *In re North Plaza, LLC*, court explored the Ninth Circuit District Courts’ application of the *Hilton* criteria and found that up until that point the districts disagreed when deciding whether to stay a final bankruptcy court order pending appeal. *In re North Plaza, LLC, supra*, 395 B.R. at 120. The court found that some courts required a Lender to show under first factor that he is “likely to succeed” on the merits, rather than merely presenting a “substantial case” (*In re Johnston*, 2007 WL 2684736 [Bankr.E.D.Wash. 2007]), while others held that the four factors are conjunctive, and Lender would not win a stay unless each factor is established by a preponderance of the evidence (*In re: Pon*, 1994 U.S. Dist. LEXIS 2559 at \*6 [N.D.Cal. 1994]), while still others recited the traditional Ninth Circuit “sliding scale” balancing tests used for preliminary injunctions and temporary restraining orders (*Lynch v. Ca. Pub. Util. Comm’n*, 2004 WL 793530, \*2, 2004 U.S. Dist. LEXIS 6022 at \*6 (N.D. Cal. 2004).

After reviewing the different standards, the court found that *Lynch’s* “sliding scale” approach ignored the procedural posture of a Rule 8005 stay where the Lender is appealing a bankruptcy court’s final determination. “A ‘sliding scale’ approach, which often results in disproportionately weighting the ‘irreparable harm’ prong, is appropriate for preliminary injunctions because a court deals with the dispute on first impressions, relies on a less-than-developed factual and legal record, and will ultimately revisit the issue down the road. In contrast, where - as here - a court has taken extensive evidence and briefing and issued a determination on the merits, an interest in finality arises. This finality would be rendered impotent if an enjoined party could always raise the specter of irreparable injury to trump the trial court’s order, no matter how unlikely an appellate victory on the merits.” *In re North Plaza, LLC, supra*, 395 B.R. at 120.

Thus, the court considered *In re: Johnston* and *In re: Pon* to be persuasive and

1 required that a moving party show that it is more likely than not he, she, or it will  
2 succeed on the merits, whatever the possibility of irreparable injury. *Ibid.*

### 3 III.

#### 4 **THE FACTS OF THIS CASE SUPPORT THE IMPOSITION OF THE** 5 **STAY PENDING APPEAL**

6 As expressed above, for a stay pending appeal to be entered, the party  
7 requesting such a stay must show: (1) Lender's likelihood of success on the merits of  
8 the appeal; (2) significant and/or irreparable harm that will come to Lender absent a  
9 stay; (3) harm to the adverse party if a stay is granted; and (4) where the public  
10 interest lies.

#### 11 A. *Debtor's Likelihood of Success*

12 The Bankruptcy Court's decision to convert a chapter 11 case to chapter 7 is  
13 review for any abuse of discretion (*Pioneer Liquidating Corp. v. U.S. Trustee (In re*  
14 *Consol. Pioneer Mortg. Entities)*, (9<sup>th</sup> Cir. 2001) 264 F.3d 803, 806; *Johnston v. JEM*  
15 *Dev. Co. (In re Johnston)*, (9<sup>th</sup> Cir. BAP 1992) 149 B.R. 158, 160). A bankruptcy  
16 court abuses its discretion if it based a decision on an incorrect legal rule, or its  
17 application of the law was illogical, implausible or without support in inferences that  
18 may be drawn from the facts in the record (*U.S. v. Hinkson*, (9<sup>th</sup> Cir. 2009) 585 F.3d  
19 1247, 1262; *Ellsworth v. Lifescape Med. Assoc's., P.C. (In re Ellsworth)*, (9<sup>th</sup> Cir.  
20 2011) 455 B.R. 904, 914. Nevertheless, the District Court has an independent duty  
21 to review de novo whether the Debtor was given due process before the Final  
22 Conversion Order was entered (*Owens-Corning Fiberglass Corp. v. Ctr. Wholesale,*  
23 *Inc., (In re Ctr. Wholesale, Inc.,* (9<sup>th</sup> Cir. 1985) 759 F.2d 1440, 1448; *GMAC Mortg.*  
24 *Corp. v. Salisbury (In re Loloee)*, (9<sup>th</sup> Cir. BAP 1999) 241 B.R. 655, 661.

#### 25 1. *The Bankruptcy Court Denied the Debtor Due Process On the* 26 *Conversion Order.*

27 11 U.S.C. Section 1112(b)(1) provides that only “ on request of a party in  
28 interest, and after notice and a hearing” may a case be converted or dismissed (11

U.S.C. Section 1112(b)(1)). Similarly, a sua sponte conversion on dismissal can only be ordered after notice and an opportunity to be heard are provided to the debtor and other parties in interest (*In re Bijelonic* (C.D. Cal 2012) 2012 WL 2263259, \*5). As the Supreme Court has ruled: “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested parties to make their appearance. (*Mullane v. Cent. Hanover Bank & Trust, Co.*, (1950) 339 U.S. 306, 314). In other words, the reviewing court “must determine whether the notice given to the Debtor was “reasonably calculated” to give him a meaningful opportunity to oppose the conversion if he so desired.” (*In re Jackson*, (9<sup>th</sup>. Cir. BAP 2012) 2012 WL 5416529, \*5).<sup>8</sup>

In the instant case, it is clear that the Debtor has not been given notice that would be reasonably calculated to give the Debtor a meaningful opportunity to oppose the conversion of this case. As provided above, the Bankruptcy Court converted this case on three separate grounds: the Debtor’s delayed MORs, the Debtor’s late status report and the alleged continuing loss to and diminution of the estate and the absence of a reasonable likelihood of rehabilitation. There is no denying that Indymac, any other creditor or the U.S. Trustee, have not filed a noticed motion for the conversion of the Debtor’s case. As such, the Debtor has not been provided with the necessary notice required under 11 U.S.C. Section 1112(b)(1). The Bankruptcy Court, instead, converted this matter *sua sponte* in what the Debtor asserts is an attempt to take the Debtor’s appeals out of its hands and put them in the hands of a trustee. Indeed Indymac has already argued in the appeal set for hearing

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<sup>8</sup>Although this case is not published, it is suitable for citation for whatever persuasive value it may have.



1 on October 17, 2013 that the Debtor lacks standing to continue the appeal. As  
2 pointed out above, the imposition of an order *sua sponte* does not relieve the  
3 Bankruptcy Court of providing the Debtor an opportunity to be noticed and be heard  
4 on the motion.

5 The Bankruptcy Court points to the Scheduling Order to claim that the Debtor  
6 was on notice of the possibility of a conversion at all times. There are a number of  
7 problems with this position. First and foremost, the Scheduling Order makes no  
8 mention of the possibility of conversion based on the alleged continuing loss to and  
9 diminution of the estate and the absence of a reasonable likelihood of rehabilitation.  
10 To the extent the Bankruptcy Court was relying on the Scheduling Order for  
11 converting the matter under these grounds, the Bankruptcy Court simply cannot do  
12 so as the Scheduling Order is completely silent as to this potential ground for  
13 conversion. At most, the Bankruptcy Court could seek to rely upon Indymac's  
14 opposition to the Debtor's Disclosure Statement which merely suggested the  
15 possibility of a conversion. Obviously, such a suggestion is not a "request of a party  
16 in interest" providing for notice and a hearing on a filed motion for conversion.  
17 Furthermore, motions to convert are to be served on all creditors (Federal Rules of  
18 Bankruptcy Procedure ("FRBP") Rule 2002), that of course was not done here.  
19 Clearly then, the Debtor has not had any notice and has not been given a meaningful  
20 opportunity to oppose the conversion on the grounds of the alleged continuing loss  
21 to and diminution of the estate and the absence of a reasonable likelihood of  
22 rehabilitation. Furthermore, the motion was not served on all creditors as is required  
23 by the FRBP's.

24 With regards to the conversion under the later MORs and the late filed status  
25 conference, the Debtor believes that the notice provided, a generalized scheduling  
26 order informing the debtor that a bankruptcy may be dismissed or converted for the  
27 debtor's failure to comply with various reporting requirements did not apprise the  
28 Debtor of the specific alleged failures of the Debtor and did not give the Debtor a

1 reasonable opportunity to oppose the conversion. As provided above, neither the  
2 Bankruptcy Court, the U.S. Trustee or any creditor had informed the Debtor of any  
3 alleged failures or delays prior to the status conference. The Bankruptcy Court's  
4 tentative ruling made no mention of any potential for conversion of the bankruptcy.  
5 The Debtor had no notice, prior to the hearing that these issues would be considered  
6 during the status conference, in fact, the tentative ruling called for the Bankruptcy  
7 Court to provide a further date for the filing of an amended disclosure statement. The  
8 May MOR had been filed late prior to the previous status conference, no mention of  
9 its late filing was made at the earlier status conference in July, 2013, to the extent it  
10 was late filed at that time, the Debtor was not put on notice that it would be  
11 considered as part of a motion to convert the case. Further, 11 U.S.C. Section  
12 1112(b)(2)(B) provides that, where the grounds for converting or dismissing the case  
13 include an act or omission of the debtor other than under paragraph (4)(A), the  
14 "Bankruptcy Court may not convert a case under this chapter to a case under chapter  
15 7" if there exists a reasonable justification for the act or omission and that the act or  
16 omission will be cured within a reasonable period of time fixed by the court. (See 11  
17 U.S.C. Section 1112(b)(2)).

18 Because the Debtor was not given any notice that conversion was being  
19 considered at the status conference, because the issues of the late filed MORs and the  
20 late filed status report had never been discussed by the Bankruptcy Court, by any  
21 creditor, by the U.S. Trustee or any interested party prior to the status conference, the  
22 Debtor could not be prepared to offer any evidence that would show a reasonable  
23 justification for the late filed documents. Further, the Debtor has not been offered  
24 any opportunity to file the one document that had not been filed as of the status  
25 conference, the August operating report. All other documents were on file and could  
26 be considered by the Bankruptcy Court, the U.S. Trustee and creditors. Under all of  
27 the circumstances, it is clear that the generalized notice provided in the Scheduling  
28 Order was not enough to give the Debtor a reasonable opportunity to prepare an



1 objection to the conversion due to the late filed MORs and the late filed status report.

2 2. *The Bankruptcy Court Abused Its Discretion By Entering The*  
3 *Conversion Order.*

4 Although a Bankruptcy Court has discretion to determine if causes exists and  
5 how to ultimately dispose of a case, conversion and/or dismissal of a case is clearly  
6 a drastic measure and a heavy burden lies on the movant to prove that such relief is  
7 warranted and is not premature (*In re State Street Associates, L.P.*, (Bankr.N.D.N.Y.  
8 2006) 348 B.R. 627). What happens then, when the Bankruptcy Court is the moving  
9 party? Is the heavy burden to prove that relief is warranted and not premature  
10 removed from the Bankruptcy Court's analysis? Of course not. As the Bankruptcy  
11 Court has converted this case *sua sponte* and, essentially, on an emergency basis, the  
12 Debtor would argue that the burden to show that such extraordinary relief is  
13 warranted is all the more necessary.

14 As provided above, the Bankruptcy Court found that "cause" for conversion  
15 relied upon three separate findings by the Bankruptcy Court: 1. That the Debtor was  
16 late for an MOR in May and that the Debtor had failed to file its most recent MOR  
17 for August as of the October 5, 2013 status conference; 2. That the Debtor was late  
18 in filing its most recent status report for the October 5, 2013 status conference and 3.  
19 That there is substantial or continuing loss to or diminution of the estate and that  
20 there is an absence of a reasonable likelihood of rehabilitation. In reviewing each  
21 finding, the Debtor notes that significant errors were made by the Bankruptcy Court,  
22 all of which show that the Bankruptcy Court has abused its discretion in converting  
23 the case under its own motion and without giving the Debtor an opportunity to defend  
24 the motion. Furthermore the Bankruptcy Court and the Debtor have been in constant  
25 contact on the case through the continuing relief from stay, appeal, and hearings on  
26 the motion for relief from stay. After the July 18, 2013 status conference, the Debtor  
27 has been in front of the Bankruptcy Court for three evidentiary hearings on July 30,  
28 2013, September 10, 2013 and September 18, 2013, accompanied by various filings

1 and the submission of significant evidence on all matters.

2 On the late filed MORs, the Bankruptcy Court pointed specifically to the late  
3 filing of the May MOR, the alleged non-filing of the July MOR and the non-filing of  
4 the August MOR. The May MOR was, admittedly late filed. However, the May  
5 MOR was filed before the July status conference and the Debtor's delayed filing of  
6 the MOR was not raised at all. How is it that the May MOR was not an issue worth  
7 discussing, at all, in July but rose to the level of "cause" a full three months later. The  
8 answer is clear, it was not cause in July and it is not cause for conversion now. The  
9 Bankruptcy Court then claims that the Debtor never filed its July MOR. As shown  
10 above, the Debtor did file the July MOR. Clearly an incorrect allegation that a filed  
11 MOR was not filed is not "cause" for conversion. Finally, the Bankruptcy Court  
12 relied upon the Debtor's failure to file the August MOR.

13 As expressed above, the Bankruptcy may not convert a case to chapter 7 if the  
14 cause for doing so is a debtor's omission "for which there exists a reasonable  
15 justification for the act or omission; and that will be cured within a reasonable period  
16 of time fixed by the court" (11 U.S.C. Section 1112(b)(2)). This is a statutory  
17 requirement, one that the Debtor was not given. As provided above, the reason for  
18 the late filed MOR for August was well justified as the Debtor was heavily burdened  
19 with emergency filings in order to protect the Subject Property. Furthermore, the  
20 Subject Property is not leased, so reporting operations is less significant in this case.  
21 Notwithstanding the lack of actual prejudice, the Debtor offered to bring the  
22 operating report current on the same day as the first hearing on any alleged omission  
23 and was not given the opportunity to do so. As such, the Debtor believes that the  
24 Bankruptcy Court committed reversible error in converting the matter due to late  
25 MOR's.

26 The same problems exist with the alleged late filing of the status report. The  
27 status report was filed, albeit several days later. The same time pressures on the relief  
28 from stay appeal apply to the late filed status report as they existed for the MORs.

1 Furthermore the report provided information of the commencement of repairs and the  
2 scaffolding of the Subject Property. This event did not fully occur more than a week  
3 before the hearing and therefore the reporting of significant current event as they  
4 actually occurred. Furthermore, the nature of and anticipated commencement of the  
5 repairs was part of the testimony the Bankruptcy Court refused to hear during the  
6 relief from stay hearings.

7 Despite the late filing, Indymac and the Bankruptcy Court had an opportunity  
8 to review the status report. In fact, Indymac attempted to use the status report in a  
9 bizarre attempt to claim that the Debtor's commencement of repairs actually placed  
10 the Subject Property at risk. After spending months arguing that the Debtor was  
11 placing the Subject Property at risk by not repairing the alleged water intrusion issues,  
12 Indymac performed an abrupt about face and argued that the Debtor's repairs were  
13 placing the Subject Property at risk by exposing parts of the Subject Property to the  
14 elements. Indymac used the status report to argue a point in direct contradiction of  
15 its previous stance. How, then, was the late filed status report harmful to Indymac or  
16 any creditor? It was not. Instead, the late filed report merely gave the Bankruptcy  
17 Court an excuse to convert the case while a pending appeal could reverse the  
18 Bankruptcy Court's hard work in granting relief from stay. Indeed, the Bankruptcy  
19 Court once again ignored the Bankruptcy Code's direction that conversion or  
20 dismissal should not be granted when a debtor has, or will within reasonable period  
21 of time, cure an omission. Basing conversion on one late filed status report is clearly  
22 not "cause" for the drastic measure of conversion and in doing so, the Bankruptcy  
23 Court has abused its discretion.

24 The final issue is the most glaring evidence of the Bankruptcy Court's abuse.  
25 The Bankruptcy Court found that, on the record before it, the Debtor's bankruptcy  
26 showed a continuing loss to or diminution of the estate and that there was an absence  
27 of a reasonable likelihood of rehabilitation. The Bankruptcy Court relied upon the  
28 granting of relief from stay that will, in its eyes, inevitably lead to the foreclosure on

1 the Subject Property and upon the evidence that the Debtor has seen a continuing loss  
2 during the pendency of the Bankruptcy. The problem is that these findings are based  
3 on a record that has continuously been manipulated by the Bankruptcy Court itself.  
4 As provided in detail above, the Bankruptcy Court has refused to allow testimony  
5 and/or accept evidence establishing that:

- 6 1. The Debtor had received a \$450,000 cashier's check from Aviara,  
7 eliminating any current losses and, in fact, giving the Debtor the  
8 necessary funds to reorganize;
- 9 2. That the Subject Property has increased in value over the time that the  
10 Debtor has been in bankruptcy. The Debtor's latest offer of proof was  
11 a valuation by David Eshelman that placed the "as is" value of the  
12 Subject Property at \$5,800,000, over \$700,000 more than the original  
13 value provided by an original "as is" appraisal of \$5,100,000, again  
14 eliminating any alleged loss;
- 15 3. That the Debtor has been doing necessary testing, obtaining quotes and  
16 conferring with experts in order to ensure that the repairs done to the  
17 Subject Property could be done correctly and would eliminate the  
18 alleged water intrusion issue. The Debtor submitted evidence that those  
19 repairs had commenced, a fact that the Bankruptcy Court ignored in  
20 determining in its Conversion Order that the Debtor had failed to start  
21 those repairs;
- 22 4. That the Debtor was to have Kamran Banayan testify as to the Debtor's  
23 ability to reorganize in good faith and the Debtor's intent, from the  
24 commencement of the case to effectively reorganize as opposed to  
25 merely delaying Indymac, but the Bankruptcy Court refused to allow his  
26 testimony; and,
- 27 5. That the Debtor offered a valid and reasonable disclosure statement and  
28 plan that was dependant upon the Debtor retaining the Subject Property.

1           The fact that the Bankruptcy Court granted relief from stay on the  
2           Subject Property is certainly an obstacle to such a plan. However, the  
3           Bankruptcy Court ignored the fact that the relief from stay order is  
4           currently on appeal and the effect of that order has been stayed by the  
5           District Court.

6           The sad truth is, the Bankruptcy Court has continuously prevented the Debtor  
7           from presenting any evidence as to the same exact reasons upon which the  
8           Bankruptcy Court has based its order on conversion. The true record, as previously  
9           presented to the District Court in its previous appeals (See NOL Exhibits A and B),  
10          establishes that the Debtor has a fantastic property in the Subject Property, that the  
11          Debtor has the funds to finalize the property and take it to sale or reorganization  
12          within the next three years, that the Debtor can do an effective reorganization that  
13          will pay all creditors in full and that the Debtor would do so if only it was given a fair  
14          and reasonable opportunity to do so, an opportunity that the Bankruptcy Court has  
15          denied the Debtor at every turn. Furthermore, the Debtor can make periodic adequate  
16          protection payments but the Bankruptcy Court has refused to set these payments  
17          despite numerous requests by the Debtor over the past six months. This is not how  
18          a debtor should be treated in bankruptcy and is counter to the basic tenets of  
19          bankruptcy reorganization under chapter 11, wherein a debtor is to be given every  
20          opportunity to get a fresh start and the Bankruptcy Code should be weighted in favor  
21          of giving a debtor the benefit of the doubt. The fact that the Bankruptcy Court has  
22          once again refused to allow the Debtor to present evidence of the ability to reorganize  
23          on its behalf by giving the Debtor no notice of a hearing to convert on these grounds  
24          shows, again, that the Bankruptcy Court has committed an abuse of discretion.

25          The District Court may also wish to consider the Bankruptcy Court's options  
26          at the time of the status conference. It could have done nothing, allowing the appeals  
27          to go forward and setting a new hearing date for the status conference and the  
28          disclosure statement, allowing the Debtor to complete the pending appeals. It could

1 have set a noticed hearing for the dismissal or conversion of the case, allowing the  
 2 Debtor to complete the pending appeals while also giving all interested parties due  
 3 process on the conversion and/or dismissal. The Bankruptcy Court could have  
 4 dismissed the bankruptcy with a bar to refile, which would have left the appeals in  
 5 the hands of the Debtor. Instead, the Bankruptcy Court chose the extraordinary  
 6 remedy of converting the Debtor's case. The result is that the Debtor has potentially  
 7 lost the control of the appeals, has left the trustee unprepared to handle the pending  
 8 appeals and because the Bankruptcy Court's order for relief from stay continues to  
 9 apply in the event of a conversion the Trustee currently has little, if anything, to  
 10 actually administer. The facts is the Bankruptcy took the only course of action that  
 11 would jeopardize the pending appeals and would take the prosecution of those  
 12 appeals out of the Debtor's hands. This course of action by the Bankruptcy Court  
 13 shows that the Bankruptcy Court has committed a clear and alarming abuse of  
 14 discretion by converting this case. For all these reasons, the Debtor's Conversion  
 15 Order should be reversed and this appeal should be granted.

16 *B. Significant and Irreparable Harm Will Come to Debtor Absent A Stay*

17 It is axiomatic in California that Real property is usually deemed "unique," so  
 18 that injury thereto or loss thereof cannot be compensated in damages, and injunctive  
 19 relief is therefore readily granted in cases that involve real property. See  
 20 Cal.Civ.Code § 3387 (damages presumed inadequate for breach of agreement to  
 21 convey real property). Further, "[l]osing (real property) through foreclosure is an  
 22 irreparable injury." Wrobel v. S.L. Pope & Assocs., 2007 WL 2345036, \*1 (S.D.Cal.  
 23 2007).

24 Further, the Subject Property is a beautiful home in a highly desirable area.  
 25 The evidence now before the District Court shows that the beauty and uniqueness of  
 26 the Subject Property is reflected in its current "as is" value of \$5.3 Million based on  
 27 Bouman's May appraisal (an "as is" appraisal by David Eshelman set the "as is" value  
 28 at \$5,800,000 as of August 20, 2013) and the \$5.8 to \$6.3 Million "when complete"



1 value may now be established. Allowing the conversion to occur at this time, would  
2 be inequitable and would result in a travesty for the Debtor and its owner who has not  
3 only put in more than a million dollars into the Subject Property but, as the  
4 Bankruptcy Court acknowledged, has put his blood, sweat and tears into the Subject  
5 Property over the past seven years. The Debtor believes a plan of reorganization  
6 where the Subject Property is maximized and the Debtor either sells the Subject  
7 Property or refinances the Subject Property in order to pay all creditors in full and  
8 realizes the full value of the Subject Property is the best available result. The Court  
9 refuses to allow this to happen and the Subject Property is now in imminent danger.  
10 The Bankruptcy Court would have the Debtor lose control of this case at a crucial  
11 period of time, with the Debtor's appeal on the relief from stay order pending before  
12 this Court, the adversarial action pending before the Bankruptcy Court facing a  
13 motion to dismiss and a motion for a preliminary injunction all at a time when the  
14 Debtor has undertaken significant repairs to the Subject Property which only makes  
15 the Subject Property that much more valuable.

16 Although the Trustee has not yet made a decision on whether to seek time from  
17 the Bankruptcy Court to list the Subject Property for sale, it is an issue that should  
18 still be in the Debtor's hands. Further, the Trustee has indicated that it cannot  
19 possibly prepare for the hearings that are currently pending before this Court and the  
20 Bankruptcy Court. Indymac is arguing that the Debtor lacks standing to appear at  
21 these hearings. If that is the case, the Debtor's valuable estate has been effectively  
22 left without a responsible person to care for it, at least for the time being. The harm  
23 that may result from this rudderless estate, specifically the loss of its most valuable  
24 asset in the Subject Property, would be devastating to the Debtor and to the Debtor's  
25 estate.

26 *C. Harm To The Adverse Party If A Stay Is Granted.*

27 By comparison the risk to Indymac is almost non-existent. If the District Court  
28 grants a stay on the Conversion Order, Indymac will be faced with the situation where



1 it must litigate the pending appeal on the relief from stay order and the adversarial  
 2 action on the merits against a prepared and interested party, rather than facing an  
 3 empty seat.

4 As has previously been discussed, from a strictly formalistic perspective, the  
 5 only harm that will come to IndyMac Ventures if a stay is granted is that it may (and  
 6 only assuming, arguendo, that the Debtor is unsuccessful in its appeal) have to wait  
 7 just a little bit longer to either foreclose on the property or have the Trustee liquidate  
 8 the same. Or, taking a dimmer yet broader and real-world view of IndyMac Ventures'  
 9 motivations, it will be deprived of the vast (approximately \$1,900,000) windfall that  
 10 it will receive if its sale of the Real Property is allowed to proceed. Furthermore any  
 11 claimed harm can be obviated by the ordering of adequate protection payments.

12 *D. Where The Public Interest Lies.*

13 The *In re North Plaza, LLC*, court considered that the “public interest” lies in  
 14 “speedy and accurate bankruptcy proceedings.” *In re North Plaza, LLC, supra*, 395  
 15 B.R. at 127. Here, the Bankruptcy Court certainly desired a “speedy” bankruptcy  
 16 proceeding because that would allow it to clear a case from its calendar that it has  
 17 clearly not favored from its inception and it will, possibly, make its determinations  
 18 on relief from stay appeal-proof.

19 But the *In re North Plaza, LLC* Court’s use of the word “and” in the above-  
 20 quoted language requires that “speedy” be accompanied by and be consistent with  
 21 “accurate.” This means that bankruptcy proceedings must not be so speedy that  
 22 things are overlooked and issues such contradicting evidence can be pushed aside by  
 23 court hell bent on a speedy conclusion. Yes, the Bankruptcy Court has the desire to  
 24 a speedy bankruptcy proceeding by a debtor; but the Debtor has an equal right to an  
 25 accurate one. As provided above, conversion requires adequate notice and an  
 26 opportunity for a meaningful hearing, even where said conversion is being proposed  
 27 *sua sponte*. As the Court has made the determination of conversion on incorrect and  
 28 now completely controverted evidence, the fair and accurate determination of facts

1 has been sacrificed for the interest of a speedy process. Here, the appropriate result  
 2 should have been to allow Indymac, if it is so inclined to file a noticed motion for  
 3 conversion of this case. If Indymac can prove its case after allowing the Debtor a full  
 4 and complete opportunity to rebut Indymac's claims, then the appropriate process will  
 5 have been followed and the proper result reached. Here, that has not occurred.

6 **IV.**

7 **CONCLUSION**

8 The Debtor respectfully requests that Court issue a stay of the Conversion  
 9 Order's effect pending a hearing on the appeal. The Debtor believes there is a  
 10 likelihood of success on appeal as, at the very least, the Bankruptcy Court has denied  
 11 the Debtor due process and has abused its discretion in granting a conversion where  
 12 "cause" does not exist and that the inevitable harm to the Debtor would be irreparable  
 13 and significant due to the unique nature of all real property and particularly the  
 14 Subject Property, that the harm to the Movant is relatively insignificant and that the  
 15 public interest for accurate determinations all support the imposition of this stay.

16  
 17 Dated: October 15, 2013

/s/ John L. Smaha  
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 Attorneys for YBA Nineteen, LLC

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